

The Hon. Richard A. Jones

U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,	)	CAUSE NO. CR10-0310 RAJ
	)	
Plaintiff,	)	DEFENDANT'S SENTENCING
	)	MEMORANDUM
v.	)	
	)	
FREDERICK DARREN BERG,	)	
	)	
Defendant.	)	

**INTRODUCTION**

The defendant, Frederick Darren Berg, by and through his counsel Michael C. Nance, Attorney at Law, and Russell M. Aoki of Aoki Law PLLC, respectfully requests this Court to accept the Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement which mandates a sentence of eighteen years.<sup>1</sup>

**GUIDELINE CALCULATIONS**

The Court will find the plea agreement does not set out guideline calculations, particularly pertaining to loss amount. At best, the parties could only estimate a loss

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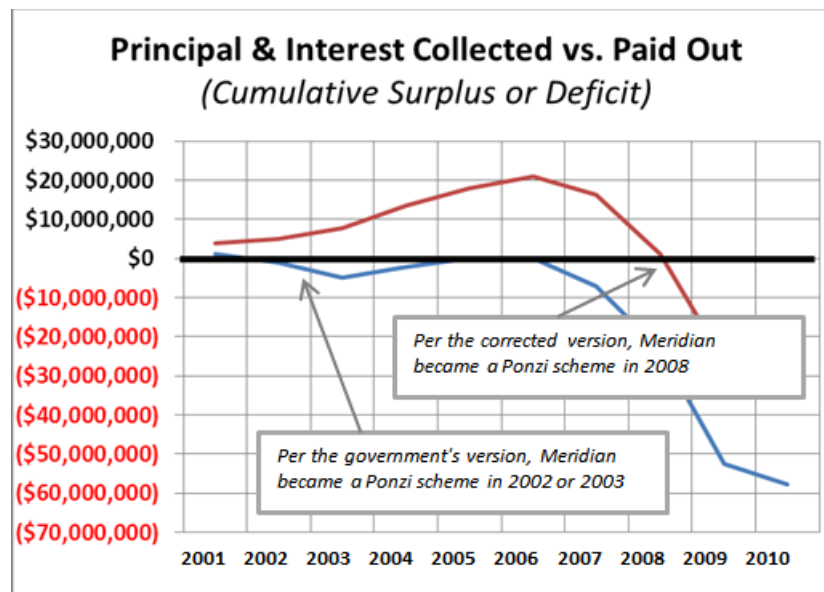
<sup>1</sup> From the outset, Mr. Berg has actively participated in his defense, offering suggestions on legal strategy, financial accounting and the framing of argument. Due to a mail sorting mistake at the Federal Detention Center he did not have an opportunity to review this memorandum prior to its submission. The defense, therefore, asks leave to supplement this filing as appropriate.

1 amount of approximately \$100 million. An exact amount cannot be determined due to the  
2 lack of records, insufficient information as to whether any figures are fully devoid of interest  
3 payments, and whether market loss is applicable. Even after the entry of Mr. Berg's guilty  
4 plea, the Government spent months attempting to calculate an accurate loss figure and is  
5 still unable to present a loss amount that is precise and reliable. In a recent letter to  
6 defense counsel, it conceded that over \$23 million in deposits and \$1.1 million in  
7 withdrawals could not be categorized because of missing records to document their  
8 source.

9  
10 The applicable guideline for calculating a fraud loss amount requires that the court  
11 make a reasonable estimate of the loss. USSG § 2B1.1. cmt. n.3. "Actual loss" is the  
12 "reasonably foreseeable pecuniary harm that resulted from the offense, meaning monetary  
13 harm that the defendant knew or, under the circumstances, should have known was a  
14 potential result of the offense." *Id.*, Cmt. n.3(a)(i),(iv). In calculating loss amount in Ponzi  
15 scheme-type activity, the court should make factual determination establishing the scope  
16 of the defendant's undertaking and the amount of losses reasonably foreseeable to him.  
17 *United States v. Treadwell*, 593 F.3d 990 (9<sup>th</sup> Cir. 2010).

18 Since his last court appearance, Mr. Berg has accessed the 124,000-row Excel  
19 spreadsheet recently compiled and used by the Government as a basis for its most  
20 updated calculations and determined that the loss amount is not as high as that portrayed  
21 by the Government and that his fraudulent Ponzi activity possibly did not occur until 2008.  
22 However, unauthorized investments to Mr. Berg's motor coach businesses occurred  
23 earlier. It was only around that time that Meridian first paid out in the aggregate more in  
24 principal and interest to investors than it had previously taken in. Below is a graph  
25  
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prepared by Mr. Berg after his review of the Government's spreadsheet. The purpose of this graph is to clarify the timing of the "Ponzi" activity.



This graph does not include the earlier unauthorized wire transfers, which Mr. Berg admits. See, Declaration of Russell M. Aoki (herein "Aoki Dec") and attachments therein.

Some investors were apparently paid interest payments before losing re-invested principal, and the amounts paid out are likely understated because of the dearth of available records. Notably, the real estate market changes that began around the same time aggravated Mr. Berg's tenuous position and fueled further losses. As referenced in defendant's objections to Probation's draft report, regardless of how much credit he is due from market losses, they were an undeniable factor in compounding and accelerating the losses his investors suffered. Aoki Dec. Although the actual loss amount is fairly debatable, it may well be significantly less than \$100 million.

The Government will also seek to enhance Mr. Berg's guideline numbers for his purported abuse of trust (USSG §3B1.3), his sophisticated means (§2B1.1(b)(9)(C)), and

1 his number of victims( §2B1.1(b)(2)). These factors are closely correlated with each other  
 2 and with the approximately \$100 million loss amount and, if applied by this Court, would  
 3 provide unnecessary independent weight. See Frank O. Bowman III, *Sentencing High-*  
 4 *Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 170, 2008 WL 2201039  
 5 (Feb. 2008). “In effect, what the Guidelines have done over time is to tease out many of  
 6 the factors for which loss served as a rough proxy and to give them independent weight in  
 7 the offense-level calculus.” *Id.*

8  
 9 The result is that many factors for which loss was already a proxy not only have  
 10 been given independent weight but also impose disproportionate increases in  
 11 prison time because they add offense levels on top of those already imposed  
 12 for loss itself and do so at the top of the sentencing table where sentencing  
 13 ranges are wide... Any case involving a corporate officer and a multi-million  
 14 dollar fraud will almost always trigger application of multi offense-level  
 15 enhancements that have the effect of punishing the defendant over and over for  
 16 the same basic thing - conducting a big fraud in a corporate setting.

17 *Id.* at 7. See also, Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes:*  
 18 *Reforming Punishment of Financial Reporting Fraud*, 28 Cardozo L. Rev. 1611, 1648-49  
 19 (2007). (Factors such as sophisticated means and large number of victims “double-count  
 20 because they are captured by other enhancements or by the loss calculation.”); Alan Ellis,  
 21 John R. Steer, Mark Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic*  
 22 *Offenses*, 25 Crim. Just. 34, 37 (2011) (“The loss table often overstates the actual harm  
 23 suffered by the victim,” and “[m]ultiple, overlapping enhancements also have the effect of  
 24 ‘double-counting’ in some cases,” while “the guidelines failed to take into account  
 25 important mitigating offense and offender characteristics.”)

26 The Commission has recognized this problem of “factor creep,” in which more and  
 27 more adjustments are added to the sentencing rules, making it difficult to insure their

1 cumulative effect properly track offense seriousness. *Fifteen Year Report at 137*. Justice  
 2 Breyer in 1999 warned that there is “little, if anything, to be gained in terms of  
 3 punishment’s classical objectives by trying to use highly detailed offense characteristics to  
 4 distinguish finally among similar offenders. And there is much to be lost, both in terms of  
 5 Guideline workability and even in terms of fairness (recalled the Guidelines’ largo rhythmic  
 6 numerical scales).... The precision is false.” See, e.g., Justice Stephen Breyer, *Federal*  
 7 *Sentencing Guidelines Revisited*, 11 Fed. Sent’g Rep. 180, 199 WL 730985 at 11 (1999).

8  
 9 A guideline calculation for a wire fraud involving an approximate \$100 million loss  
 10 amount is unfairly enhanced with factors that routinely and inherently accompany a fraud  
 11 of this magnitude: sophisticated means (USSG §2B1.1(b)(9)(C)), abuse of trust (§3B1.3),  
 12 and number of victims §2B1.1(b)(2)). A large scale fraud of this type necessarily includes  
 13 these factors, which are already captured in the loss amount for which Mr. Berg is  
 14 accountable and which are not atypical of the heartland of wire fraud cases with this  
 15 degree of loss. For the Court to enhance Mr. Berg’s total offense level with an additional  
 16 *ten levels* for these factors would artificially inflate the guidelines to unrealistic proportions  
 17 and overwhelm the more appropriate factors of 18 USC § 3553(a), factors which actually  
 18 support the sentence the parties have negotiated.

#### 19 **BASIS FOR ACCEPTANCE OF THE 11(c)(1)(C) PLEA AGREEMENT**

20 **Mr. Berg’s Cooperation Provided the Government with a Greater Understanding of**  
 21 **the Scope of his Conduct.**

22 Foregoing an immunity agreement, Mr. Berg participated in a four-hour meeting with  
 23 the Government where he explained his business activities which eventually became the  
 24 basis for this prosecution. At the completion of his four-hour meeting, Mr. Berg remained  
 25

1 prepared to meet with the Government in subsequent meetings to further elaborate in  
2 more detail the extent of his conduct. Although no additional follow-up meetings took  
3 place, Mr. Berg's cooperation still proved to be of significance.

4 On October 13, 2010, the Government filed an Information, charging nine counts of  
5 wire fraud and one count of money laundering, based upon the statements of Mr. Berg and  
6 his first counsel, Mr. Irwin Schwartz . The Government later learned that Mr. Berg was not  
7 truthful pertaining to funds he held in a separate account for which he has agreed to plead  
8 guilty and which are reflected in Count 12 (bankruptcy fraud - asset concealment).

9 A subsequent 34-page criminal complaint, based on references to Mr. Schwartz's  
10 detailed description of his criminal activity, was filed on October 19, 2010. Additionally, Mr.  
11 Berg cooperated with the two bankruptcy trustees pertaining to his involuntary bankruptcy  
12 and his own personal bankruptcy. The information he provided, when balanced against  
13 the information that became the basis for his bankruptcy fraud - asset concealment and  
14 money laundering charges, nevertheless made his cooperation helpful to the bankruptcy  
15 trustee's work and also expedited the Government's criminal investigation.

16  
17 **Meridian Mortgage Funds Began As A Lawful Business Entity.**

18 Mr. Berg ran a number of successful businesses including a motor coach company,  
19 real estate business, software enterprise, and a construction firm. Meridian Mortgage  
20 Funds began as a lawful activity. The foundation of its work was creating mortgage funds  
21 based upon seller financed residential notes. From its inception, it became a popular  
22 investment vehicle. However, when purchasers began failing to pay their obligations on  
23 the notes, investors became concerned and asked for redemption of their investments.  
24

1 The onslaught of a large number of requested redemptions ultimately caused Mr. Berg to  
2 seek investors to pay these remittances, which became a cornerstone of this prosecution.

3 Mr. Berg's business was *not* designed to be a fraud from the beginning. Instead, it  
4 was a legitimate business that, due to dramatic adverse changes in the market, prompted  
5 him to act out of desperation in hopes of keeping his businesses alive and his investors  
6 satisfied until the downward trend of the economy reversed. However, no one – certainly  
7 not Mr. Berg – anticipated the magnitude and duration of the economic recession that hit  
8 this area and that crippled his business. Mr. Berg's creation of a legitimate business is  
9 noted in Probation's own pre-sentence report and noted by bankruptcy trustee Mark  
10 Calvert to Mr. Berg's defense counsel.

11 **Mr. Berg's Plea Avoided A Costly Trial.**

12 This case involves millions of pages of documents and hundreds of victims.  
13 Preparing for trial would have required an enormous expenditure of time and expense to  
14 properly investigate and examine the relevant documents, prepare for the testimony of  
15 government witnesses, and obtain the forensic accounting services necessary to mount an  
16 adequate defense. However, Mr. Berg made clear from the beginning that he did not wish  
17 to contest the charges and that he wanted to resolve this case and take full responsibility  
18 for his actions. His only concern was that the negotiated plea be one that was reasonably  
19 proportionate to the crime he committed. As this Court is aware, the Government and Mr.  
20 Berg, through his defense counsel, participated in two settlement conferences. After  
21 careful evaluation of all the factors available at that time in determining the most  
22 reasonable resolution by both parties, Mr. Berg accepted this plea agreement on August 2,  
23 2011.

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**Mr. Berg's Background Provides A Basis For Better Understanding The Appropriateness Of The Proposed Sentence.**

Mr. Berg was born in Ashland, Oregon. As described by Probation, Mr. Berg's father passed away in 1987 from cirrhosis of the liver.

He was in his mid-50's. The defendant described his father as "a tortured man." He explained that he supported the family working as a butcher and drank excessively. When his father was sober, he was "the funniest guy around;" however, when intoxicated he was "very mean and abusive." The defendant's mother recalled those early years as "very chaotic and emotionally depressing." She noted that she stayed married to the defendant's father for twenty-three years "mostly out of fear." Despite this, the defendant was described as outgoing and industrious. He explained that, at the age of nine, he began selling cherries in his grandfather's front yard. He added, "I didn't just sell cherries, I had a complete business plan worked out."

Pre-sentence Report, p. 9, ¶ 47.

Mr. Berg's sister, Wendi Sigel, better describes her brother's upbringing in her letter of support.

Darren is one of the cleverest and funny people I have ever known. He has a mind that grasps concepts quicker than most, often leaving him with competing ideas warring for space in his brain. He could have been extremely accomplished at many things, but his brain has never let him concentrate on any one area. He is driven by the need to make the multiple concepts in his head realities. He longs for acceptance and friendship and feels that no one would ever give that to him freely. He was raised in a family where nothing about him was accepted. My father considered him a sissy and my stepfather was homophobic and barely tolerated Darren's presence in his house. Although Darren had not admitted to being gay in high school my stepfather treated him like he was contagious, and did not hide the fact that he couldn't wait until he graduated and moved on. My other brothers, Shane and Rory, took a lot of their anger out on Darren. My father would beat them and in turn they would beat Darren. He was close to my mother and I because we were the only people in the family who loved him for who he was, which was a talented, emotional boy yearning for a place where people would like him. He left Grants Pass with the need to prove that he was worth the space he was taking up in this world.

Darren created an alternate world for himself early in his life. The emotional and physical abuse that was happening in our household was simply too much

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1 for him to handle. When he was three I remember observing him curled up in  
 2 bed as chairs were flying, everyone was screaming, my father was beating my  
 3 mother and the police were coming with sirens blaring. I thought at that time  
 4 that I would love to be able to shut out all of the unbelievable things that were  
 5 happening. I truly feared for my life and Darren was curled up in bed asleep. I  
 6 know now that this was the beginning of his mind shutting down. The world we  
 7 inhabited was too scary for him to navigate, so he went somewhere he could be  
 8 safe. When he was eight he created an alter ego named Rod Taylor. He set  
 9 up a desk, ordered a sign and "went into business". Due to his limited  
 10 knowledge of the world he chose to run a bus company because our paternal  
 grandfather was a Greyhound bus driver who often talked about the bus  
 business. Rod Taylor was successful, admired and smart, everything Darren  
 did not believe he was. He spent hours in his "play" world and we considered  
 him odd but endearingly cute. If Darren had one true belief in childhood it was  
 that Rod Taylor was invincible. Rod would never fail, Rod was the smartest,  
 the best and always knew what to do. He was admired and people craved his  
 attention and friendship.

11 Of course many of us had imaginary friends in our childhoods to help us  
 12 through real or imagined traumas. As we mature and enter the "real" world we  
 13 know that people will consider us odd if we bring our "friends" along. I honestly  
 14 think that when Darren was forced to part with the fictional Rod Taylor it was  
 15 simply not possible for him. He was an adolescent who had few friends, was  
 reviled at home and too scared to navigate the real world. So when forced to  
 choose between Darren Muskopf (Berg) with all of his shortcomings and  
 problems, or Rod Taylor who was admired and successful, he gave up Darren.  
 Inside Darren was gone and Rod became real.

16 Aoki Dec.

17 In addition, Mr. Berg's mother further explains the tortured life of Mr. Berg when he  
 18 was growing up.

19 Darren was always a delight as a child, very obedient and loving despite, or  
 20 maybe because of, his being a part of a very dysfunctional family in his early  
 21 years. Until Darren was a young teenager our life was one of abuse of us all, at  
 22 the hands of his father who was an alcoholic. The youngest of four children,  
 23 Darren seldom experienced physical abuse but was considered by his father to  
 24 be a sissy and suffered much mental abuse. I learned later in years that not  
 25 only was he subject to his father's abuse but his older brother took over when  
 we were not around and would give his younger brothers 'whops' when they  
 displeased him. They were sworn to secrecy and this only came to light after  
 they were grown and their older brother shared his very destructive behavior,  
 which he was ashamed of. He had learned by examples set by his father. My

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1 second oldest, a daughter, would have none of it and stood up to the older  
 2 brother and was spared his abuse. Both older brothers teased Darren as being  
 3 a sissy just as they saw their father do, I would also learn later. His sister was  
 his only sibling always kind to him and they are extremely close to this day.

4 I had married very young and didn't have the strength, the means or the  
 5 fortitude to get out of the relationship until Darren was 13 years of age. Fearing  
 6 his father's threats to kill us, and all my family members if we left, I stayed and  
 7 received many beatings in protecting my children from his abuse. Indeed, after I  
 filed for divorce, he came to my place of work and dragged me out threatening  
 to kill us both with a shotgun he had in his car. Saved by one of the doctors in  
 the clinic where I worked I would never know if he may have carried through  
 with his threat.

8  
 9 Aoki Dec.

10 No one gets to choose how they will be raised. Some are fortunate enough to grow  
 11 up in nurturing and stable families. Others are impacted by damaging traumatic  
 12 experiences, which cause issues that must be resolved later in life. Mr. Berg, his mother,  
 13 and his sister have spent much time reflecting on their past family life and the need to  
 14 resolve life-long issues. Mr. Berg's mother and sister will continue to offer unconditional  
 15 support of Mr. Berg throughout his sentence.

## 16 CONCLUSION

17 Frederick Darren Berg, by and through his counsel, respectfully requests this Court  
 18 to accept the 11(c)(1)(C) stipulated plea agreement and impose a sentence of eighteen  
 19 years. He also requests that this Court make a judicial recommendation for his placement  
 20 at FCI Terminal Island, that it recommend the BOP waive any public safety factor criteria  
 21 that would otherwise prevent his timely placement into minimum security camp, and that

22 ///

23 ///

24 ///

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1 his supervised release conditions not bar his self-employment.

2 DATED this 3rd day of February, 2012.

3  
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